

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PERSHING PACIFIC WEST, LLC,  
Plaintiff,  
v.  
FERRETTI GROUP, USA, INC., *et al.*  
Defendants.

Case No. 10-cv-1345-L(DHB)

## ORDER:

**(1) GRANTING IN PART AND  
DENYING IN PART MTU GMBH'S  
MOTION TO DISMISS [DOC. 80];  
AND**

**(2) DENYING FERRETTI AND  
MARINEMAX'S *EX PARTE*  
APPLICATION [DOC. 91]**

On May 24, 2010, Plaintiff Pershing Pacific West, LLC (“Pershing”) commenced this action in the San Diego Superior Court against Defendants Ferretti Group, USA, Inc. (“Ferretti”), MarineMax, Inc., and MTU Detroit Diesel, Inc., doing business as Detroit Diesel Corporation (“MTU DD”). About a month later, Ferretti and MarineMax removed this action to federal court. On April 12, 2012, after receiving leave from the Court, Pershing filed its First Amended Complaint (“FAC”) in order to add Defendant MTU Friedrichshafen GmbH (“MTU GmbH”) to this action. MTU GmbH now moves to dismiss. Pershing opposes.

The Court found this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). (Doc. 83.) For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** MTU GmbH's motion to dismiss.

1     **I. BACKGROUND**

2       **A. Sale of the Yacht**

3       On August 22, 2008, Pershing and MarineMax entered into a written Purchase Agreement  
 4 in which Pershing<sup>1</sup> agreed to buy a 73-foot power boat (“yacht”)<sup>2</sup> manufactured by Pershing  
 5 S.p.A., an Italian corporation wholly owned by the Ferretti Group, for \$5,000,000. (FAC ¶ 9,  
 6 Ex. A.) The yacht was built in 2008 with two new Series 2000 Detroit Diesel engines, separately  
 7 manufactured by MTU DD and MTU GmbH (collectively, “MTU”). (*Id.* ¶¶ 5, 11.) Pershing  
 8 alleges that the Purchase Agreement sought to disclaim all warranties and referred Pershing to  
 9 the manufacturer’s warranty. (*Id.* ¶ 10.) At the time of sale, and despite Pershing’s request,  
 10 Defendants each failed to provide the warranties upon which Pershing was directed to rely upon.  
 11 (*Id.*) Pershing also alleges that “[n]either at the time of sale nor anytime thereafter was  
 12 [Pershing] provided with the terms and conditions of the warranty.” (*Id.*)

13       Sometime thereafter, Defendants delivered the yacht to Pershing in Fano, Italy. (FAC ¶  
 14 12.) At the time Pershing took delivery of the yacht, and “despite continued representations as to  
 15 the existence of warranties,” Defendants failed to provide Pershing with any warranties. (*Id.*)  
 16 Rather, Pershing was promised “such warranty information would thereafter be provided.” (*Id.*)  
 17 Pershing alleges that it was not provided with such warranty information, and that it was not  
 18 given a “reasonable opportunity” to inspect the yacht. (*Id.*)

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20       **B. Allegations of the Yacht’s Defective Condition**

21       On September 9, 2008, during the yacht’s first trip from Fano, Italy to Croatia, a high fuel  
 22 temperature warning light activated for the port engine. (FAC ¶ 13.) The next day, the high fuel  
 23 temperature alarm activated for the same engine again. (*Id.*) After returning to Fano, Italy, the  
 24 warning could not be reproduced. (*Id.*)

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26       <sup>1</sup> Pershing is a limited liability company formed for the purpose of purchasing the yacht,  
 27 and is wholly owned by Eric B. Benson. (FAC ¶ 1.)

28       <sup>2</sup> The parties describe the yacht as a 72-foot vessel in their moving papers. However,  
 Pershing alleges that the yacht is 73 feet (FAC ¶ 9).

1       On December 16, 2008, the yacht was delivered to Port Everglades, Florida. (FAC ¶ 14.)  
 2 Then, on December 26, 2008, while leaving the Bahamas Islands, another high temperature fuel  
 3 warning occurred, and the engine failed to come up to a normal cruising speed of 2400 rpms.

4 (Id.) Pershing alleges that the engines would not exceed 1800 rpms. (Id.)

5       From September 2008 to the present, MTU, “either directly or through its authorized  
 6 service representative, has attempted to fix the problems of [the] high fuel temperature to the  
 7 port diesel engine and the inability of the port diesel engine to reach its normal cruising speed of  
 8 2400 rpms.” (FAC ¶ 16.) Pershing alleges that the fuel temperature on the port engine has run  
 9 as high as 40 degrees above the fuel temperature on the starboard engine, exceeding 203  
 10 degrees. (Id.) Other problems have included a fuel leak from the overflow valve on the port  
 11 engine on June 29, 2009, and a leak in the fuel pump also in the port engine on June 30, 2009.  
 12 (Id.) The fuel pump has since been replaced, and so has a defective injector. (Id.) Fuel line  
 13 leaks have also been detected at connections on June 27, 2009. (Id.)

14       During the same time period when the problems arose, MTU and its authorized  
 15 representatives made numerous inspections of the port engine and attempted repairs on more  
 16 than five different occasions, seeking to resolve the fuel-overheating problem and the port  
 17 engine’s inability to reach regular speeds. (FAC ¶ 17.) Pershing alleges a myriad of detailed  
 18 repair attempts that occurred at least fourteen times between June 2009 and January 2010. (Id.)  
 19 On March 28, 2010, the yacht sustained another fuel leak in the port engine resulting in the  
 20 deposit of more than 4 inches of fuel in the main bilge. (Id. ¶ 18.) In response, MTU and its  
 21 authorized representatives again attempted repairs of the engine. (Id.)

22       On April 23, 2010, Pershing’s counsel sent a formal correspondence, advising Ferretti,  
 23 MarineMax, and MTU DD of the “persistent defective condition of the boat and communicated  
 24 its intent to seek a judicial remedy in the absence of an acceptable response.” (FAC ¶ 19; *see*  
 25 *also* Compl. Ex. B.) To date, Pershing has not received a response to that correspondence.  
 26 (FAC ¶ 20.)

27       On May 2, 2010, the yacht was once again taken out for sea trials. (FAC ¶ 20.) Again,  
 28 while attempting to bring the yacht up to speed, both the high pressure fuel alarm and fire alarms

sounded. (*Id.*) Ultimately, the yacht was taken back into the port. (*Id.*) As of the date Pershing filed its complaint, the deficiencies associated with the yacht have not been repaired. (*Id.*) In addition to the engine-related problems, the yacht also experienced “persistent and uncured deficiencies” with the Besenzi System and port Trim Tab. (*Id.* ¶ 21.) These problems also have not been repaired. (*Id.*) Pershing alleges that “[a]s a consequence of the malfunctions . . . [it] has had to repeatedly cancel planned trips and seldom been able to use [the yacht].” (*Id.* ¶ 21.) “[T]he engines have been used in total only about 200 hours, much of which time was spent in sea trials after repairs and for the purpose of determining whether repairs were successful.” (*Id.*)

On May 24, 2010, Pershing commenced this action in San Diego Superior Court, alleging causes of action for: (1) revocation of acceptance; (2) rescission; (3) breach of contract; (4) breach of implied warranty of merchantability; (5) negligence; and (6) breach of express warranty. About a month later, Ferretti and MarineMax removed this action to federal court. (Doc. 1.) After obtaining leave from the Court, Pershing filed its FAC on April 12, 2012, alleging the same causes of action, but adding MTU GmbH as a defendant. MTU GmbH now moves to dismiss the FAC under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). (Doc. 80.) Pershing opposes.

## II. JURISDICTION

When the parties dispute whether personal jurisdiction over a foreign defendant is proper, “the plaintiff bears the burden of establishing that jurisdiction exists.” *Rios Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). In ruling on the motion, the “court may consider evidence presented in affidavits to assist in its determination and may order discovery on the jurisdictional issues.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). Where the motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make “a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Bryton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009). “In determining whether the plaintiff has met this burden, the Court must take the allegations in the

1 plaintiff's complaint as true and resolve the disputed jurisdictional facts in the plaintiff's favor."  
 2 *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154, 1158 (C.D. Cal. 2000)  
 3 (citing *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 473 (9th Cir. 1995)). A *prima facie* showing  
 4 means that "the plaintiff need only demonstrate facts that if true would support jurisdiction over  
 5 the defendant." *Unocal*, 248 F.3d at 922.

6 "The general rule is that personal jurisdiction over a defendant is proper if it is permitted  
 7 by a long-arm statute and if the exercise of that jurisdiction does not violate federal due  
 8 process." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Both the California  
 9 and federal long-arm statutes require compliance with due-process requirements. Fed. R. Civ. P.  
 10 4(k)(2); *Pebble Beach*, 453 F.3d at 1155; *see Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485  
 11 F.3d 150, 161 (9th Cir. 2007).

12 There are two types of personal jurisdiction: general and specific. General jurisdiction  
 13 "enables a court to hear cases unrelated to the defendant's forum activities[.]" *Fields v.*  
 14 *Sedgewick Assoc. Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). Specific jurisdiction allows the  
 15 court to exercise jurisdiction over a defendant whose forum-related activities gave rise to the  
 16 action before the court. *See Bancroft & Masters, Inc. v. August Nat'l Inc.*, 223 F.3d 1082, 1086  
 17 (9th Cir. 2000). The Ninth Circuit employs a three-part test to determine whether the  
 18 defendant's contacts with the forum state are sufficient to subject it to specific jurisdiction.  
 19 *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Under the three-part inquiry, specific  
 20 jurisdiction exists only if: (1) the out-of-state defendant purposefully availed itself of the  
 21 privilege of conducting activities in the forum, thereby invoking the benefits and protections of  
 22 the forum's laws; (2) the cause of action arose out of the defendant's forum-related activities;  
 23 and (3) the exercise of jurisdiction is reasonable. *Myers v. Bennett Law Offices*, 238 F.3d 1068,  
 24 1072 (9th Cir. 2001). "If any of the three requirements is not satisfied, jurisdiction in the forum  
 25 would deprive the defendant of due process of law." *Pebble Beach*, 453 F.3d at 1155.

26 MTU GmbH argues that the Court lacks personal jurisdiction, both general and specific.  
 27 In response, Pershing argues the contrary, primarily based on MTU GmbH's distribution  
 28 agreement with Valley Power Systems, Inc. ("VPS") to provide sales and services for MTU

1 GmbH and others. For the following reasons, the Court finds Pershing meets its burden to  
 2 establish that the Court has specific jurisdiction over MTU GmbH.

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4 **A. Purposeful Availment**

5 Under the first prong of the specific-jurisdiction test, the plaintiff must establish that the  
 6 defendant either purposefully availed themselves of the privilege of conducting activities in  
 7 California, or purposefully directed their activities toward California. *Schwarzeneggar v. Fred*  
 8 *Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). Although contacts must be more than  
 9 random, fortuitous, or attenuated, contacts that are “isolated” or “sporadic” may support specific  
 10 jurisdiction if they create a “substantial connection” with the forum. *Burger King Corp. v.*  
 11 *Rudzewicz*, 471 U.S. 461, 472-73 (1985). “[I]f the defendant directly solicits business in the  
 12 forum state, the resulting transactions will probably constitute the deliberate transaction of  
 13 business invoking the benefits of the forum state’s laws.” *Decker Coal Co. v. Commonwealth*  
 14 *Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986) (citing *Gates Learjet Corp. v. Jensen*, 743 F.2d  
 15 1325, 1331 (9th Cir. 1984) (solicitation of distributorship agreement); *Taubler v. Giraud*, 655  
 16 F.2d 991, 994 (9th Cir. 1981) (solicitation of California market by sending of wine samples)).  
 17 “Similarly, conducting contract negotiations in the forum state will probably qualify as an  
 18 invocation of the forum law’s benefits and protections.” *Id.*

19 MTU GmbH is a wholly-owned subsidiary of Tognum AG, and MTU DD (now known as  
 20 Tognum America) is a wholly-owned subsidiary of MTU GmbH. (Walton Decl. ¶ 6, Ex. J.) In  
 21 2007, Tognum AG entered into a distributor agreement with VPS—expressly on behalf of MTU  
 22 GmbH—for the express purpose of providing sales and services of MTU GmbH’s and other  
 23 MTU-branded entities’ products and parts in California.<sup>3</sup> (Lee Decl. ¶ 6, Ex. A.) VPS is a  
 24 factory-authorized dealer and distributor for engine, transmission, and equipment manufacturers  
 25 that is incorporated in California with its principal place of business in the City of Industry,

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27 <sup>3</sup> That distributor relationship was renewed in 2012, with MTU GmbH expressly named  
 28 as an “Affiliated Company” of Tognum AG for which VPS would continue to act as a  
 distributor. (Lee Decl. ¶ 3, Ex. C.)

1 California. (*Id.* ¶ 3.) The distributor agreements expressly state that they are entered into by  
 2 Tognum AG as “appointed by MTU Friedrichshafen GmbH” among others. (*Id.* ¶ 5–8, Exs.  
 3 A–C.) Moreover, the stated purpose of the agreements are “to appoint DISTRIBUTOR as an  
 4 authorized Distributor (a) to sell and service Products and Parts, [and] (b) to establish the  
 5 location(s) from which DISTRIBUTOR shall conduct Distributorship Operations.” (Lee Decl.  
 6 Ex. A.) VPS’s Area of Responsibility explicitly designates numerous counties in California,  
 7 including San Diego. (*Id.*) Lastly, the distributor agreements expressly identify the MTU  
 8 GmbH-manufactured Series 2000 MTU engine—which is the engine that is squarely at issue this  
 9 action—that VPA is contracted to distribute for MTU GmbH in California. (*Id.*) Based on the  
 10 foregoing, Pershing argues that MTU GmbH purposefully availed itself of California laws.

11       MTU GmbH responds to the provided evidence, and the argument that the evidence  
 12 establishes purposeful availment, simply with: “it was Plaintiff’s conduct in bringing the vessel  
 13 to California and Plaintiff’s requests for warranty work which prompted [MTU GmbH’s] alleged  
 14 activity within California.” (Def.’s Reply 3:27–4:4.) That statement strongly suggests that MTU  
 15 GmbH recognizes that it engaged in activities within California. MTU GmbH goes on to  
 16 conclude that it “did not purposefully come into California and avail itself of California’s laws.”  
 17 (*Id.*)

18       Based on Pershing’s overwhelming evidence—in particular, MTU GmbH’s distribution  
 19 arrangement with VPS—the Court concludes that MTU GmbH purposefully availed itself of the  
 20 privilege of conducting activities in California.<sup>4</sup> *See Schwarzeneggar*, 374 F.3d at 802; *Decker*  
 21 *Coal*, 805 F.2d at 840.

## 23       B.     Arising Out of Forum-Related Activities

24       The “arising out of” requirement is met if but for the contacts between the defendant and

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26       <sup>4</sup> Pershing also argues that MTU GmbH’s alleged negligence within California also  
 27 renders it subject to personal jurisdiction. (Pl.’s Opp’n 11:26–12:18.) However, MTU GmbH  
 28 does not address this issue at all in its reply brief. This failure to respond could also be  
 interpreted as concession to Pershing’s argument.

1 the forum state, the cause of action would not have arisen. *See Terracom v. Valley Nat'l Bank*,  
 2 49 F.3d 555, 561 (9th Cir. 1995). In other words, the court must determine if the plaintiff would  
 3 not have been injured “but for” the defendant’s conduct directed towards the plaintiff in  
 4 California. *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (citing  
 5 *Ballard*, 65 F.3d at 1500).

6 According to Pershing, but for MTU GmbH’s distribution and service of its products and  
 7 parts in California, Pershing would not have claims for breach of implied warranty of  
 8 merchantability, negligence and breach of express warranty against MTU GmbH. (Pl.’s Opp’n  
 9 12:27–13:12.) Additionally, Pershing contends that MTU GmbH expressly warrants the engines  
 10 on Pershing’s yacht, and VPS is obligated to service MTU GmbH’s warranties in California  
 11 through their distributor agreements. (*Id.*) MTU GmbH concedes that the negligence claim  
 12 potentially arises out of the forum, but also frames the FAC as focusing “on the foreign  
 13 transaction and any warranties that may have issued thereon.” (Def.’s Mot. 5:1–8.) MTU  
 14 GmbH does not, however, respond to any of Pershing’s contentions or even address this second  
 15 requirement for the specific-jurisdiction analysis in its reply brief.

16 MTU GmbH fails to provide a particularly compelling analysis for this requirement.  
 17 After framing the FAC as stated above, MTU GmbH goes on to briefly discuss the merits of  
 18 Pershing’s negligence claim. (Def.’s Mot. 5:3–11.) Presumably, it has chosen this route because  
 19 it feels that Pershing’s inability to sustain a negligence claim would also negate its contention  
 20 that the claims arise out of forum-related activities. It is worth mentioning again that MTU  
 21 GmbH’s reply brief is completely devoid of any discussion addressing this second requirement  
 22 for specific jurisdiction. Pershing, on the other hand, provides ample explanation that is  
 23 consistent with its allegations in the FAC. Notably, Pershing alleges that MTU is a warrantor of  
 24 engine products sold in the United States, and that MTU failed to exercise reasonable care in the  
 25 diagnosis and repair of the yacht’s persistent problems. (FAC ¶¶ 49, 51.) Some, if not most, of  
 26 the diagnosis and repair attempts were done through MTU GmbH’s distributor, VPS, in San  
 27 Diego, California. (See Lee Decl. ¶ 11, Ex. E.) Consequently, the Court concludes that but for  
 28 MTU GmbH’s repeated failures to properly diagnose and repair the yacht’s engines, Pershing

1 would not have sustained injuries to its yacht, which in turn gives rise to various potential claims  
 2 in California. *See Terracom*, 49 F.3d at 561.

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4 **C. Reasonableness**

5 “Even if the first two requirements are met, in order to satisfy the Due Process Clause, the  
 6 exercise of personal jurisdiction must be reasonable.” *Panavision Int’l*, 141 F.3d at 1322 (citing  
 7 *Ziegler*, 64 F.3d at 474-75). For jurisdiction to be reasonable, it must comport with “fair play  
 8 and substantial justice.” *Burger King*, 471 U.S. at 476. A district court presumes, however, that  
 9 its exercise of jurisdiction over a defendant is reasonable if the first two requirements of the  
 10 specific-jurisdiction test are met. *See Ballard*, 65 F.3d at 1500. If the first two requirements are  
 11 satisfied, then the burden of proof shifts and the defendant must “present a compelling case that  
 12 the presence of some other considerations would render jurisdiction unreasonable.” *Id.* (quoting  
 13 *Burger King*, 471 U.S. at 477) (internal quotation marks omitted)

14 Because Pershing has met the first two requirements of the specific-jurisdiction test, the  
 15 burden now shifts to MTU GmbH to show unreasonableness. *See Ballard*, 65 F.3d at 1500. The  
 16 following is MTU GmbH’s entire argument addressing reasonableness:

17 Here, Plaintiff [Pershing] cannot show purposeful availment or any  
 18 forum related activity by [MTU GmbH] related to the claims at issue.  
 19 Under these circumstances, it would be unreasonable to require [MTU  
 20 GmbH], a German corporation, to incur the burden and expense of  
 21 litigating in this forum when the case arises out of an Italian purchase  
 22 of a Yacht.  
 23 (Def.’s Mot. 5:23–26.) Once again, MTU GmbH’s reply brief wholly fails to discuss an  
 24 important point, this time the final requirement of reasonableness. Effectively, so does MTU  
 25 GmbH’s motion. Therefore, MTU GmbH completely fails to present any compelling  
 26 consideration that would render jurisdiction unreasonable. *See Ballard*, 65 F.3d at 1500.

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28 **III. LEGAL STANDARD**

29 The court must dismiss a cause of action for failure to state a claim upon which relief can  
 30 be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal  
 31 sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court

1 must accept all allegations of material fact as true and construe them in light most favorable to  
 2 the nonmoving party. *Cedars-Sanai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d  
 3 972, 975 (9th Cir. 2007). Material allegations, even if doubtful in fact, are assumed to be true.  
 4 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, the court need not “necessarily  
 5 assume the truth of legal conclusions merely because they are cast in the form of factual  
 6 allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)  
 7 (internal quotation marks omitted). In fact, the court does not need to accept any legal  
 8 conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, —, 129 S. Ct. 1937, 1949 (2009)

9       “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed  
 10 factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’  
 11 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause  
 12 of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Instead, the  
 13 allegations in the complaint “must be enough to raise a right to relief above the speculative  
 14 level.” *Id.* “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
 15 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at  
 16 1949 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff  
 17 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
 18 liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability  
 19 requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”  
 20 *Id.* A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory  
 21 or for insufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749  
 22 F.2d 530, 534 (9th Cir. 1984).

23       Generally, courts may not consider material outside the complaint when ruling on a  
 24 motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19  
 25 (9th Cir. 1990). However, documents specifically identified in the complaint whose authenticity  
 26 is not questioned by parties may also be considered. *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1  
 27 (9th Cir. 1995) (superceded by statutes on other grounds). Moreover, the court may consider the  
 28 full text of those documents, even when the complaint quotes only selected portions. *Id.* It may

1 also consider material properly subject to judicial notice without converting the motion into one  
 2 for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

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4 **IV. DISCUSSION**

5 **A. Breach of the Implied Warranty of Merchantability<sup>5</sup>**

6 The California Commercial Codes implies a warranty of merchantability that goods “[a]re  
 7 fit for ordinary purposes for which such goods are used.” *Birdsong v. Apple, Inc.*, 590 F.3d 955,  
 8 958 (9th Cir. 2009) (quoting Cal. Com. Code § 2314(2)(c)). The implied warranty “provides for  
 9 a minimum level of quality.” *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291,  
 10 1296 (1995) (internal quotation marks omitted). A breach of the warranty of merchantability  
 11 occurs if the product lacks “even the most basic degree of fitness for ordinary use.” *Mocek v.*  
 12 *Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003) (citing Cal. Com. Code § 2314(2)).

13 Under California law, a plaintiff asserting a breach-of-warranty cause of action must  
 14 stand in vertical contractual privity with the defendant. *Anunziato*, 402 F. Supp. 2d at 1141. A  
 15 buyer and seller stand in privity if they are in adjoining links of the distribution chain. *Osborne*  
 16 *v. Subaru of Am. Inc.*, 198 Cal. App. 3d 646, 656 n.6 (1988). Thus, an end consumer who buys  
 17 from a retailer is not in privity with a manufacturer. *Id.*

18 “Courts, however, have recognized an exception to the privity requirement—when a  
 19 plaintiff pleads that he or she is a third party beneficiary, he or she may assert a claim for the  
 20 implied warranty’s breach.” *In re Google Phone Litig.*, No. 10-CV-1177, 2012 WL 3155571, at  
 21 \*9 (N.D. Cal. Aug. 2, 2012) (citing *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1185 (C.D.  
 22 Cal. 2005)). California has codified third-party-beneficiary liability as follows: “A contract,  
 23 made expressly for the benefit of a third person, may be enforced by him at any time before the  
 24 parties thereto rescind it.” Cal. Civ. Code § 1559. “Because third party beneficiary status is a

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26       <sup>5</sup> “The substantive elements are the same under the Song-Beverly Act and Magnuson-  
 27 Moss Act.” *Birdsong*, 590 F.3d at 958 n.2 (citing Cal. Civ. Code §§ 1791, *et seq.*; 15 U.S.C. §  
 28 2301, *et seq.*). “Under both, the court applies state warranty law.” *Id.* Furthermore, “the failure  
 to state a claim under state law necessarily constitutes a failure to state a claim under [the  
 MMWA].” *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 832-33 (2006).

1 matter of contract interpretation, a person seeking to enforce a contract as a third party  
 2 beneficiary ‘must plead a contract which was made expressly for his or her benefit and one in  
 3 which it clearly appears that he or she was a beneficiary.’” *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 957 (2005).

5 In addition to the third-party-beneficiary exception to privity, California courts have also  
 6 articulated other exceptions, such as: (1) reliance on the manufacturer’s written representations  
 7 in labels or advertising materials, (2) cases involving foodstuffs, drugs, and pesticides; and (3)  
 8 cases involving certain employees who are injured while using dangerous products purchased by  
 9 their employers. *Windham at Carmel Mountain Ass’n v. Superior Court*, 109 Cal. App. 4th  
 10 1162, 1169 (2003); *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 54 Cal. App. 4th 357, 369  
 11 n.10 (1997).

12 Pershing alleges that MarineMax “engaged in the sale of pleasure boats,” Ferretti  
 13 “engaged in the business of manufacturing, selling, and repairing pleasure boats,” and MTU  
 14 GmbH “engaged in the manufacture of diesel engines for use in pleasure boats,” including the  
 15 engines for the yacht at issue in this action. (FAC ¶¶ 2, 4, 6.) For all intents and purposes,  
 16 Pershing is the end consumer, MarineMax is the retailer, Ferretti is the manufacturer of the  
 17 yacht, and MTU GmbH is the manufacturer of the yacht’s engines. Thus, there is no vertical  
 18 privity in the distribution chain between Pershing and MTU GmbH. Moreover, Pershing fails to  
 19 cite any law or identify any allegations in the FAC that show that it falls under any of the privity  
 20 exceptions. *See In re Google Phone Litig.*, 2012 WL 3155571, at \*9; *Windham*, 109 Cal. App.  
 21 4th at 1169; *Fieldstone*, 54 Cal. App. 4th at 369 n.10. Those same failures apply to Pershing’s  
 22 argument that it has privity with MTU GmbH through the express warranty between the two.  
 23 (See Pl.’s Opp’n 22:9–21.) Consequently, Pershing fails to establish privity with MTU GmbH to  
 24 sustain its implied-warranty cause of action.<sup>6</sup> *See Osborne*, 198 Cal. App. 3d at 656 n.6.

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26 <sup>6</sup> At least one court has accepted an interpretation of *U.S. Roofing v. Credit Alliance*  
 27 *Corp.*, 228 Cal. App. 3d 1431 (1991), that states that “a written contract is not necessary to find  
 28 vertical privity, rather the degree of interaction and the nature of the relationship of the parties  
 can create the requisite vertical privity.” *Torres v. City of Madera*, No. CIVFF02-6385AWLJO,  
 2005 WL 1683736, at \*15 (E.D. Cal. July 11, 2005). Pershing does not make that argument,

## **B. Breach of Express Warranty**

Pershing asserts its cause of action for breach of express warranty under the MMWA for MTU GmbH's failure to provide the terms and conditions of a written warranty. (FAC ¶ 57.) MTU GmbH challenges the sufficiency of this cause of action on two grounds: (1) the MMWA does not apply to the sale of the yacht and its component parts that were manufactured outside of the country, and delivered and sold in Italy; and (2) MTU GmbH had no obligation to provide a written warranty to Pershing.

## 1. Application of the MMWA<sup>7</sup>

The MMWA “authorizes a civil suit by a consumer to enforce the terms of an implied or express warranty,” and, for the most part, “calls for the application of state written and implied warranty law, not the creation of additional federal law.” *Daugherty*, 144 Cal. App. 4th at 833; *see also Milicevic v. Fletcher Jones Imps. Ltd.*, 402 F.3d 912, 918 (9th Cir. 2005). To support its argument that the MMWA does not apply in this case, MTU GmbH directs the Court’s attention to the following Code of Federal Regulations interpreting the MMWA:

The Act covers written warranties on consumer products “distributed in commerce” as that term is defined in section 101(3). Thus, by its terms the Act arguably applies to products exported to foreign jurisdictions. However, the public interest would not be served by the use of Commission resources to enforce the Act with respect to such products. Moreover, the legislative intent to apply the requirements of the Act to such products is not sufficiently clear to justify such an extraordinary result. The Commission does not contemplate the enforcement of the Act with respect to consumer products exported to foreign jurisdictions. Products exported for sale at military post exchanges remain subject to the same enforcement standards as products sold within the United States, its territories and possessions.

16 C.F.R. § 700.1(i). MTU GmbH puts particular emphasis on the statement that “[t]he Commission does not contemplate the enforcement of the Act with respect to consumer products

thus the Court does not assess the implied-warranty cause of action under that interpretation of *U.S. Roofing*.

<sup>7</sup> Ferretti and MarineMax filed an *ex parte* application requesting that the Court either reserve its judgment regarding the application of the MMWA and Song-Beverly Act, or limit any ruling to the pleadings. These concerns are irrelevant. Therefore, the Court **DENIES** Ferretti and MarineMax's *ex parte* application. (Doc. 91.)

1 exported to foreign jurisdictions.” *Id.*

2 MTU GmbH interprets § 700.1(i) as saying that “[l]iability under the MMWA is premised  
 3 on a sale in the United States.” (Def.’s Reply 8:3–4.) No additional law is presented to support  
 4 that interpretation. That said, the Court is aware of only one case that has discussed the  
 5 application of the MMWA through § 700.1(i) involving foreign jurisdictions: *Najran Company*  
 6 *for General Contracting and Trading v. Fleetwood Enterprises, Inc.*, 659 F. Supp. 1081 (S.D.  
 7 Ga. 1986). In describing the applicability of the MMWA to “volume sales in a commercial  
 8 context,” the *Najran* court noted that there were “few, if any, significant landmarks pointing out  
 9 a proper path,” and that “[t]he legislative history of the Act offer[ed] little guidance, and case  
 10 law with respect to this particular aspect of the Act is nonexistent.” *Najran*, 659 F. Supp. at  
 11 1099 (footnote omitted). Not much has changed since 1986 when *Najran* was issued.  
 12 Consequently, the Court is left with little guidance other than the language provided in §  
 13 700.1(i).

14 Essentially, MTU GmbH implores the Court to conclude that § 700.1(i)’s language that  
 15 states that “[t]he Commission does not contemplate the enforcement of the Act with respect to  
 16 consumer products exported to foreign jurisdictions” is equivalent to the proposition that liability  
 17 under the MMWA is premised on a sale in the United States. After reviewing the plain language  
 18 of § 700.1(i), the Court cannot reach that conclusion. Section 700.1(i) applies to consumer  
 19 products “distributed in commerce,” and “products exported to foreign jurisdictions.” MTU  
 20 GmbH fails to show that any product has been exported to a foreign jurisdiction. In fact, the  
 21 allegations in the complaint suggest the opposite. Setting aside the issue of whether the yacht  
 22 qualifies as a consumer product, the yacht was manufactured in Italy and then brought *into* the  
 23 United States. Black’s Law Dictionary defines “export” as either “To send or carry abroad” or  
 24 “To send, take, or carry (a good or commodity) out of the country; to transport (merchandise)  
 25 from one country to another in the course of trade.” Black’s Law Dictionary (9th ed. 2009). It  
 26 also defines “import” as “A product brought into a country from a foreign country where it  
 27 originated” or “The process of bringing foreign goods into a country.” *Id.* The circumstances  
 28 here would define the yacht as an import rather than an export. Therefore, the Court concludes

1 that MTU GmbH fails to show that the MMWA does not apply here.

2

3 **2. The Obligation to Provide an Express Warranty**

4 The Code of Federal Regulations also provides guidance as to when written warranties  
 5 cover consumer products. Specifically, MTU GmbH directs the Court's attention to § 700.3(c),  
 6 which states that

7 The Magnuson–Moss Warranty Act generally applies to written  
 8 warranties covering consumer products. Many consumer products are  
 9 covered by warranties which are neither intended for, nor enforceable  
 10 by, consumers. A common example is a warranty given by a component  
 11 supplier to a manufacturer of consumer products. (The manufacturer  
 12 may, in turn, warrant these components to consumers.) The component  
 13 supplier's warranty is generally given solely to the product  
 14 manufacturer, and is neither intended to be conveyed to the consumer  
 15 nor brought to the consumer's attention in connection with the sale.  
 16 Such warranties are not subject to the Act, since a written warranty  
 17 under section 101(6) of the Act must become "part of the basis of the  
 18 bargain between a supplier and a buyer for purposes other than resale."  
 19 However, the Act applies to a component supplier's warranty in writing  
 20 which is given to the consumer. An example is a supplier's written  
 21 warranty to the consumer covering a refrigerator that is sold installed  
 22 in a boat or recreational vehicle. The supplier of the refrigerator relies  
 23 on the boat or vehicle assembler to convey the written agreement to the  
 24 consumer. In this case, the supplier's written warranty is to a consumer,  
 25 and is covered by the Act.

26 16 C.F.R. § 700.3(c).

27 MTU GmbH argues that this section shows that it had no obligation to provide a written  
 28 warranty to Pershing because it did not manufacture the yacht. (Def.'s Mot. 12:2–20.) Rather,  
 29 that obligation falls on the retail seller, which MTU GmbH argues is MarineMax. (*Id.*) Pershing  
 30 responds by emphasizing that this section deals with a "component supplier's warranty [that] is  
 31 generally given solely to the product manufacturer, and is neither intended to be conveyed to the  
 32 consumer nor brought to the consumer's attention in connection with the sale." (Pl.'s Opp'n  
 33 23:5–17 (quoting 16 C.F.R. § 700.3(c).) Based on that language, Pershing argues that MTU  
 34 GmbH misapplies § 700.3(c) because it alleges that MTU GmbH's warranty "was not intended  
 35 to be provided exclusively to the manufacturer (Ferretti) or the seller (MarineMax)." (*Id.* at  
 36 23:8–15.) MTU GmbH does not address Pershing's contention in its reply brief. Upon  
 37 reviewing the FAC, the Court agrees with Pershing.

1 Pershing alleges that “[a]t the time of sale, Defendant MarineMax represented that  
 2 warranties were provided by Defendants MTU and Ferretti in conjunction with the sale.” (FAC  
 3 ¶ 43.) Viewing that allegation in light most favorable to Pershing, the Court concludes that  
 4 Pershing adequately establishes that MarineMax represented to it that MTU GmbH did not  
 5 intend to provide warranties solely to Ferretti or MarineMax, thereby removing the warranty  
 6 from the scope of § 700.3(c).

7

8 **C. Negligence**

9 The economic loss rule “prevent[s] the law of contract and the law of tort from dissolving  
 10 one into the other.” *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004)  
 11 (internal quotations marks omitted). The rule generally bars tort actions for contract breaches,  
 12 thereby limiting contracting parties to contract damages. *Aas v. Superior Court*, 24 Cal. 4th 627,  
 13 643 (2000). It precludes recovery for “purely economic loss due to disappointed expectations,”  
 14 unless the plaintiff “can demonstrate harm above and beyond a broken contractual promise.”  
 15 *Robinson Helicopter*, 34 Cal. 4th at 988. In other words, “[a] person may not ordinarily recover  
 16 in tort for the breach of duties that merely restate contractual obligations.” *Aas*, 24 Cal. 4th at  
 17 643. “[I]n actions for negligence, a manufacturer’s liability is limited to damages for physical  
 18 injuries and there is no recovery for economic loss alone.” *Seely v. White Motor Co.*, 63 Cal. 2d  
 19 9, 18 (1965).

20 MTU GmbH argues that Pershing’s negligence cause of action is barred by the economic  
 21 loss rule. (Defs.’ Mot. 12:23–14:2.) Specifically, it contends that Pershing’s alleged loss is  
 22 purely economic, and that Pershing fails to allege “that the Yacht’s alleged defects, or  
 23 Defendants’ acts and commissions, injured any person or property, or caused non-economic loss of  
 24 any kind.” (*Id.* at 13:24–14:2.) In response, Pershing does not challenge the applicability of the  
 25 economic loss rule. Rather, it argues that the negligence cause of action is adequately pled  
 26 because its “damage suffered may be properly attributed to component to component damage  
 27 resulting from the alleged negligence.” (Pl.’s Opp’n 23:18–24:28.) To support its argument,  
 28 Pershing relies almost exclusively on *Jimenez v. Superior Court*, 29 Cal. 4th 473 (2002).

1       In *Jimenez*, the California Supreme Court held that a manufacturer of windows installed  
 2 in a mass-produced home during its construction could be strictly liable in tort for injuries to  
 3 other parts of the structure in which the defective windows were installed. *Jimenez*, 29 Cal. 4th  
 4 at 476. The court also emphasized that “the economic loss rule allows a plaintiff to recover in  
 5 strict products liability in tort when a product defect causes damage to ‘other property,’ that is,  
 6 property *other than the product itself*. The law of contractual warranty governs damage to the  
 7 product itself.” *Id.* at 483 (emphasis added). Tort recovery was permissible against the window  
 8 manufacturer because “California decisional law has long recognized that the economic loss rule  
 9 does not necessarily bar recovery in tort for damage that a defective product (e.g., a window)  
 10 causes to other portions of a larger product (e.g., a house) into which the former has been  
 11 incorporated . . . . ‘[T]he concept of recoverable physical injury or property damage’ ha[s] over  
 12 time ‘expanded to include damage to one part of a product caused by another, defective part.’”  
 13 *Id.* at 483-84 (quoting *Aas*, 24 Cal. 4th at 641).

14       To apply the economic loss rule under *Jimenez*, the court “must first determine what the  
 15 product at issue is.” *Jimenez*, 29 Cal. 4th at 483. “Only then do we find out whether the injury  
 16 is to the product itself (for which recovery is barred by the economic loss rule) or to the property  
 17 other than the defective product (for which plaintiffs may recover in tort).” *Id.* “[D]istinguishing  
 18 between ‘other property’ and the defective product itself in a case involving component-to-  
 19 component damage requires a determination whether the defective part is a sufficiently discrete  
 20 element of the larger product that it is not reasonable to expect its failure invariably to damage  
 21 other portions of the finished product.” *KB Home v. Superior Court*, 112 Cal. App. 4th 1076,  
 22 1087 (2003).

23       Here, the product at issue is the yacht, which Pershing contends was damaged by the  
 24 “failure of some of [its] components.” (Pl.’s Opp’n 10:25–11:6 (emphasis in original).) To  
 25 loosely analogize to *Jimenez*, the yacht is the equivalent to the house and the engines are  
 26 equivalent to the windows. *See Jimenez*, 29 Cal. 4th 483-84. Furthermore, much like *Jimenez*,  
 27 where the plaintiffs sought recovery from the window manufacturer, Pershing seeks recovery  
 28 from the engine manufacturer MTU GmbH for damage to the yacht caused by components that it

1 manufactured (the engines). That said, as MTU GmbH points out, Pershing fails to allege facts  
2 that show any component-to-component damage in the FAC. Therefore, Pershing inadequately  
3 pleads its negligence cause of action. *See Twombly*, 550 U.S. at 555.

4

5 **V. CONCLUSION & ORDER**

6 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** MTU  
7 GmbH's motion to dismiss. Specifically, the Court:

8 (1) **DENIES** the motion to dismiss brought under Rule 12(b)(2);  
9 (2) **GRANTS WITH LEAVE TO AMEND** the motion to dismiss as to the causes of  
10 action for negligence and breach of the implied warranty of merchantability; and  
11 (3) **DENIES** the motion to dismiss as to the cause of action for breach of express  
12 warranty.

13 If Pershing chooses to amend either of its causes of action for negligence or breach of the  
14 implied warranty of merchantability, it must do so by February 7, 2013. Additionally, the Court  
15 also **DENIES** Ferretti and MarineMax's *ex parte* application.

16 **IT IS SO ORDERED.**

17

18 DATED: January 24, 2013

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28



M. James Lorenz  
United States District Court Judge

COPY TO:

HON. DAVID H. BARTICK  
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL